

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK
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5 UNITED STATES OF AMERICA 06-CR-6007(CJS)

6 vs.

7 RICHARD PETIX,
8 Defendant.

Rochester, New York
January 12, 216
4:17 p.m.

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10 TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE MARIAN W. PAYSON
12 UNITED STATES MAGISTRATE JUDGE

13 WILLIAM J. HOCHUL, JR., ESQ.
14 United States Attorney
15 BY: RICHARD RESNICK, ESQ.
16 Assistant United States Attorney
17 6200 Federal Building
18 Rochester, New York 14614

19 MICHAEL D. FLOWERDAY, ESQ.
20 277 Pond View Heights
21 Rochester, New York 14612
22 Appearing on behalf of the Defendant

23 ALSO PRESENT: Ivette Hernandez, U.S. Probation Office

24 AUDIO RECORDER: Catherine A. Marr

25 TRANSCRIBER: Christi A. Macri, FAPR-CRR
Kenneth B. Keating Federal Building
100 State Street, Room 2120
Rochester, New York 14614

(Proceedings recorded by electronic sound recording,
transcript produced by computer).

P R O C E E D I N G S

* * *

(WHEREUPON, the defendant is present).

THE CLERK: United States of America vs. Richard Petix, 06-CR-6007.

MAGISTRATE JUDGE PAYSON: All right, good afternoon. I understand Mr. Petix appeared before Judge Siragusa this morning and Judge Siragusa set a date in early to mid February for a further status conference?

MS. HERNANDEZ: Yes, Your Honor.

MAGISTRATE JUDGE PAYSON: All right. So the record should reflect that because Judge Siragusa was out of the district during the holiday period of time, the matter was referred to me for the purpose of holding a hearing on the Government's motion for detention in this case, that is, the case of the petition alleging that Mr. Petix has violated conditions of his probation.

There's a separate matter pending before Judge Scott in Buffalo relating to new charges. That was not the matter before me.

The parties agreed with my assessment at the hearing that the proceedings are governed by Federal Rule of Criminal Procedure 32.1(a)(6), that is, that because this deals with the issue of release or detention for somebody who has been convicted and is under supervision, that it is the

1 defendant's burden rather than the Government's burden in this
2 case to establish by clear and convincing evidence that the
3 individual not flee or pose a danger to any other person or
4 the community.

5 At the hearing I heard testimony that was offered
6 by Mr. Petix from Mr. Petix's father. That testimony related
7 to a number of subjects, but I would say principally addressed
8 the issue of financial security that could be posted for
9 Mr. Petix.

10 Mr. Petix, Louis Petix, the defendant's father,
11 indicated a willingness to post a condominium as well as
12 perhaps another property, as I understand it, owned by the
13 defendant's grandmother, although there was some uncertainty
14 as to whether that -- the grandmother was willing to do that.

15 The Government cross-examined Mr. Petix and then
16 made a proffer with respect to facts and evidence and
17 circumstances that the Government thought the Court should
18 consider in weighing the Government's motion for detention.

19 I have considered that testimony and those
20 proffers. I have reviewed the docket sheets. I have gone
21 back and listened to a tape recording of the entire
22 proceeding. The proceeding took about an hour, it was about
23 the last thing that I was able to do before I had to be out of
24 town so I wanted to make sure that I took the time to listen
25 to it carefully again, and I have done that.

1 Significantly in my mind, Mr. Petix is before the
2 Court as a convicted defendant, specifically one who was
3 convicted of knowing transportation of child pornography in
4 interstate commerce.

5 The plea agreement pursuant to which Mr. Petix pled
6 guilty in that case states that the parties are agreeing that
7 the child pornography was transported by computer.

8 The plea agreement further states in the section in
9 which the parties agree to the factual circumstances relating
10 to the offense that there were over 1,000 images of child
11 pornography on the defendant's computer and the discussion of
12 trading child pornography.

13 Since then he has been indicted in the matter
14 pending before Judge Scott for lying to Probation concerning
15 his use of computers, devices capable of being connected to
16 the internet. And that indictment obviously constitutes a
17 finding by the grand jury that there is probable cause to
18 believe that he did lie to Probation in that respect.

19 The Government proffered various factual
20 circumstances relating to Mr. Petix's arrest on December 3rd,
21 2015. The Court doesn't find any reason not to credit those
22 proffered circumstances at this stage.

23 Perhaps evidence will develop that will call them
24 into question, but at this juncture what the Government has
25 proffered is that various members of the Probation Department,

1 including Officer Hernandez, who is Mr. Petix's probation
2 officer, were involved in his arrest on December 3rd at a
3 restaurant.

4 And at the time of the arrest Mr. Petix was
5 actively involved in using a computer, was in a program on
6 that computer; that there was a thumb drive inserted into that
7 computer; that there was a smart phone that was in his
8 possession, specifically open on the table next to the
9 computer.

10 According to the circumstances proffered by the
11 Government, Mr. Petix's girlfriend said the items were --
12 belonged to Mr. Petix.

13 And in addition, the Government has proffered that
14 there was a bag in the car that Mr. Petix was driving that has
15 been identified as Mr. Petix's bag, which had four more thumb
16 drives in it.

17 There was some evidence that was proffered with
18 respect to some text messages on the phone. Some
19 conversations about Mr. Petix's possible involvement in
20 bitcoin buying, trading transactions; some allegations made by
21 the Government concerning Mr. Petix's possible involvement in
22 unlawful dealing or distribution of Adderall.

23 I am not basing my decision on my view that the
24 record before me is sufficient to establish that Mr. Petix was
25 most probably involved in illegal activities over his phone.

1 I am not -- I don't think the record is sufficient for me to
2 reach that conclusion.

3 However, it is my view that when somebody is on
4 supervision for an offense of child pornography and interstate
5 commerce involving a computer, that the condition which is a
6 fairly typical condition which requires him to identify any
7 computers, connective devices, automated services, so forth
8 that he has, that he has access to, that he plans to use, that
9 he must identify them to Probation so that Probation can fit
10 those devices with monitoring software, that that is a very,
11 very critical condition to assure that the defendant, who is
12 on supervision, is refraining from unlawful activity,
13 particularly child pornography.

14 Here there is proffered evidence which the Court
15 credits that at the time of the arrest Mr. Petix was in
16 possession of such devices and actively using a computer with
17 a thumb drive in it.

18 I know the defense's proffer at this juncture is
19 they're not his. The Government's proffer is that the
20 probation officers, including Officer Hernandez who is in
21 court, actually observe the defendant doing that.

22 So to the extent that I need to credit one over the
23 other at this juncture, I am inclined to credit the
24 Government's proffer that Mr. Petix was arrested in possession
25 of these devices and most significantly using a computer at

1 the time of his arrest.

2 Furthermore, the grand jury has concluded that
3 there's probable cause to believe that he lied about the fact
4 that he was using these devices. And the conclusion to be
5 drawn from that, in my estimation, is that there is certainly
6 substantial doubt as to whether Mr. Petix can be trusted to
7 comply with conditions when the grand jury has found that he
8 lied about those conditions.

9 Whether I would draw a different conclusion if all
10 of those devices had been thoroughly searched and the
11 Government were here telling me that there was nothing
12 evidencing any illegal transactions and specifically any child
13 pornography related items on the devices, I don't know. I'm
14 not in that circumstance.

15 What I was told by the Government when I asked
16 about the review of those materials was that only the phone
17 had been able to be reviewed because the other devices were
18 password protected. That Mr. Petix had declined to provide
19 his password.

20 His probation conditions do obligate him to
21 cooperate in the search of any such devices. I'm not sure
22 the Government can compel him to do that certainly where there
23 may be a Fifth Amendment interest.

24 But, in any event, as far as I am aware as of
25 December 23rd, and I don't think there's any reason to think

1 that this has changed since then, the computer hadn't been
2 searched, the thumb drives had not been searched. So I am
3 not in a position to find that his activities on those devices
4 were lawful activities.

5 He does bear the burden of establishing that by
6 clear and convincing evidence that continued release would not
7 pose a danger to the community or that he doesn't pose a
8 serious risk of flight, and I do not find that he has met that
9 burden under the circumstances that have been proffered and
10 that I credit.

11 I will say that if the issue were risk of flight
12 alone, Mr. Petix had a case pending before me, I think there
13 was a violation that was filed, a pretrial release violation
14 that was filed in that case and I modified the conditions -- I
15 dealt with that without detaining Mr. Petix.

16 And as far as I know, there were no further
17 violations, at least that I can -- that I can recall. And he
18 came to court.

19 So I think that with the properties that
20 Mr. Petix's father has described, assuming that there were
21 sufficient equity in those properties, assuming the
22 grandmother was willing to post the properties, I believe that
23 I would find that there are conditions that could be set which
24 would reasonably assure against a serious risk of flight and
25 that the defendant would be able to establish that by clear

1 and convincing evidence.

2 There would be some homework we would need to do
3 with respect to those properties, but I want to be clear that
4 I am detaining Mr. Petix on grounds of danger to the
5 community, not on the grounds of serious risk of flight.

6 All right, thank you.

7 (WHEREUPON, the proceedings adjourned at 4:29 p.m.)

8 * * *

9 **CERTIFICATE OF TRANSCRIBER**

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11 In accordance with 28, U.S.C., 753(b), I certify that
12 this is a true and correct record of proceedings from the
13 official electronic sound recording of the proceedings in the
14 United States District Court for the Western District of New
15 York before the Honorable Marian W. Payson on January 12,
16 2016.

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18 S/ Christi A. Macri

19 Christi A. Macri, FAPR-CRR
20 Official Court Reporter

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